

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
AT SEATTLE

WESTERN NATIONAL MUTUAL
INSURANCE COMPANY, a foreign Insurer,

Plaintiff,

vs.

SIMON R. ROSS and JANE DOE ROSS,
husband and wife, and the marital community
composed thereof; MODULAR ORGANICS
LLC, a Washington Limited Liability
Company; and JOHN R. GARDNER and
JENNIFER L. GARDNER, husband and wife,
and the marital community composed thereof,

Defendants.

Cause No. 2: 24-cv-00941

**COMPLAINT FOR DECLARATORY
RELIEF**

Plaintiff Western National Mutual Insurance Company (“Western National”) by and
through its counsel, Soha & Lang, P.S., pleads and alleges as follows:

I. NATURE OF ACTION

In this Declaratory Relief Action, Western National seeks the following relief:

1.1 A declaration of rights, duties and liabilities of Western National under the
policies of insurance it issued to defendant and named insured Modular Organics, LLC with

1 respect to the underlying lawsuit captioned *John G. Gardner, et al. v. Simon R. Ross and Jane*
2 *Doe Ross, and Modular Organics LLC*, King County Superior Court Cause No. 23-2-10770-5
3 SEA (hereinafter “Underlying Lawsuit”).

4 II. PARTIES

5 2.1 Plaintiff Western National is a foreign insurance company licensed to conduct
6 business in the State of Washington. Western National is organized under the laws of
7 Minnesota and has its principal place of business in Minnesota.

8 2.2 Defendant Modular Organics LLC is a limited liability company incorporated
9 under the laws of the State of Washington, doing business in King County, Washington.

10 2.3 Defendant Simon R. Ross is a governor and principal shareholder of Modular
11 Organics LLC. At all times material hereto, Defendant Simon R. Ross was acting in the scope
12 and course of his employment with Modular Organics LLC.

13 2.4 Defendants Simon R. Ross and Jane Doe Ross are now and at all times material
14 hereto have been a married couple under the laws of the State of Washington residing in King
15 County, Washington. At all material times hereto Defendant Simon R. Ross was acting on his
16 own behalf, and on behalf of the Ross defendants’ marital community.

17 2.5 Defendants John G. Gardner and Jennifer L Gardner are now at all times
18 material hereto have been a married couple under the laws of the State of Washington residing
19 in King County, Washington. John G. Gardner and Jennifer L. Gardner are named as
20 defendants herein solely for the purpose of binding them to any declaratory relief sought by
21 Western National and issued by the Court.
22
23

III. JURISDICTION AND VENUE

3.1 This Court has subject matter jurisdiction under 28 U.S.C. § 1332 because there is complete diversity of citizenship between the parties, and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

3.2 Venue is proper in this Court under 28 U.S.C. § 1391 because the defendants reside and/or are domiciled in and a substantial number of the events or omissions giving rise to the claims occurred in the Western District of Washington.

3.3 This Court has the authority to determine the parties' respective rights and other legal obligations pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201. The dispute between the parties creates a justiciable controversy.

IV. STATEMENT OF FACTS

A. The Underlying Lawsuit

4.1 On or about June 14, 2023, John G. Gardner and Jennifer L. Gardner filed the Underlying Lawsuit naming Simon R. Ross, Jane Doe Ross, and Modular Organics LLC as defendants.

4.2 The plaintiffs in the Underlying Lawsuit alleged that on or about April 17, 2023, Simon R. Ross was driving a vehicle registered to Modular Organics LLC and rear-ended the vehicle Plaintiff John G. Gardner was driving, causing serious and disabling injuries to Mr. Gardner and totaling the vehicle Mr. Gardner was driving.

4.3 On March 1, 2024, Defendant Simon Ross tendered the defense of the Underlying Lawsuit to Western National, informing Western National that Mr. Ross' personal automobile liability insurer was defending.

1 4.4 On March 13, 2024, Western National appointed defense counsel for Defendants
2 Ross and Modular Organics in connection with the Underlying Lawsuit under a full reservation
3 of rights.

4 4.5 On May 2, 2024, Western National issued its reservation of rights letter to
5 Defendants Ross and Modular Organics.

6 4.6. On May 8, 2024 Defendants Ross and Modular Organics informed Western
7 National that they had settled the Underlying Litigation for \$525,000. They did not obtain
8 Western National's consent before agreeing to the settlement.

9 **B. The Western National Commercial Policy**

10 4.7. Western National issued Commercial Policy No. CPP 1273056 01 to named
11 insured Modular Organics, effective October 23, 2022 through October 23, 2023 ("Commercial
12 Policy"). This policy included Commercial General Liability coverage with the following
13 Insuring Agreement under Coverage A for Bodily Injury and Property Damage:

14 **1. Insuring Agreement**

15 **a.** We will pay those sums that the insured becomes legally
16 obligated to pay as damages because of "bodily injury" or
17 "property damage" to which this insurance applies. We will have
the right and duty to defend the insured against any "suit"
seeking those damages.

18 However, we will have no duty to defend the insured against any
19 "suit" seeking damages for "bodily injury" or "property damage"
to which this insurance does not apply. We may, at our
discretion, investigate any "occurrence" and settle any claim or
"suit" that may result. But:

- 20 **(1)** The amount we will pay for damages is limited as
21 described in Section III - Limits Of Insurance; and
22 **(2)** Our right and duty to defend ends when we have used up
23 the applicable limit of insurance in the payment of
judgments or settlements under Coverages A or B or
medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages **A** and **B**.

b. This insurance applies to “bodily injury” and “property damage” only if:

- (1)** The “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory”
- (2)** The “bodily injury” or “property damage” occurs during the policy period;

4.8 Coverage A for Bodily Injury and Property Damage is subject to the following exclusion:

2. Exclusions

This insurance does not apply to:

g. Aircraft, Auto Or Watercraft

“Bodily injury” or “property damage” arising out of the ownership, maintenance, use or entrustment to others of any aircraft, “auto” or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and “loading or unloading”.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the “occurrence” which caused the “bodily injury” or “property damage” involved the ownership, maintenance, use or entrustment to others of any aircraft, “auto” or watercraft that is owned or operated by or rented or loaned to any insured.

* * *

4.9 As a part of the Commercial Policy, Western National also issued Commercial Auto Policy No. CPP 1298220 02 to Modular Organics dba Climapod, effective from October 23, 2022 to October 23, 2023 (hereinafter “Auto Policy”).

4.10 The Auto Policy included Business Auto Coverage, written on Commercial Auto Form CA 00 01 10 13, with a Covered Autos Liability occurrence limit of \$500,000 for each accident minus deductible.

4.11 The Declarations Page for the Auto Policy provided, in part:

**BUSINESS AUTO
DECLARATION**

Group # 0001182040 Policy Period: From OCTOBER 23, 2022 To OCTOBER 23, 2023
 Policy # CPP 1298220 02 12:01 A.M. standard time at the Named Insured's mailing address.

Transaction RENEWAL DECLARATION

Insured Name and Address MODULAR ORGANICS DBA CLIMAPOD 512 6TH ST S STE 102 KIRKLAND WA 98033	Agent ISU INSURANCE SOLUTIONS GRP 05036 PO BOX 2225 WOODINVILLE, WA 98072-2225 Telephone: 425-483-4583
--	--

Business Description PRR FAB GREENHOUSES	Type of Business LIMITED LIABILITY CO	Audit Period ANNUAL	Billing Type DIRECT
--	---	-------------------------------	-------------------------------

ITEM TWO: SCHEDULE OF COVERAGES AND COVERED AUTOS
 This policy provides only those coverages where a charge is shown in the premium column below. Each of these coverages will apply only to those "autos" shown as covered "autos". "Autos" are shown as covered "autos" for a particular coverage by the entry of one or more of the symbols from the Covered Autos Section of the Business Auto Coverage Form next to the name of the coverage.

COVERAGES	COVERED AUTO SYMBOLS	LIMIT THE MOST WE WILL PAY FOR ANY ONE ACCIDENT OR LOSS	PREMIUM
COVERED AUTOS LIABILITY	7 8 9	\$500,000 Each Accident minus Deductible	\$2,165.00

BUSINESS AUTO

ITEM THREE: SCHEDULE OF COVERED AUTOS YOU OWN

DESCRIPTION				PURCHASED		LOCATION	ZONE
Unit #	Year, Make & Model, Serial No. or Vehicle Identification Number	Original Cost New	Stated Amount	State Territory	ORG.DEST.		
0001	2022 TOYOTA TACOMA PU TRUCK 3TYSZ5AN6NT099227	\$38,000		WA	021		

4.12 The Auto Policy also contains the following pertinent provisions:

BUSINESS AUTO COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V – Definitions.

SECTION I – COVERED AUTOS

Item Two of the Declarations shows the “autos” that are covered “autos” for each of your coverages. The following numerical symbols describe the “autos” that may be covered “autos”. The symbols entered next to a coverage on the Declarations designate the only “autos” that are covered “autos”.

Symbol	Description Of Covered Auto Designation Symbols	
* * *		
7	Specifically Described “Autos”	Only those “autos” described in Item Three of the Declarations for which a premium charge is shown (and Covered Autos Liability Coverage any “trailers” you don’t own while attached to any power unit described in Item Three).
8	Hired “Autos” Only	Only those “autos” you lease, hire, rent or borrow. This does not include any “auto” you lease , hire, rent or borrow from any of your “employees”, partners (if you are a partnership), members (if you are a limited liability company) or members of their households.
9	Non-owned “Autos” Only	Only those “autos” you do not own, lease, hire, rent or borrow that are used in connections with your business. This includes “autos” owned by your “employees”, partners (if you are a partnership), members (if you are a limited liability company) or members of their households but only while used in your business or your personal affairs.

4.13 The Auto Policy has the following Insuring Agreement and definition of who is an insured:

SECTION II - COVERED AUTOS LIABILITY COVERAGE

A. Coverage

We will pay those sums an “insured” legally must pay as damages because of “bodily injury” or “property damage” to which this insurance applies, caused by an “accident” and resulting from the ownership, maintenance or use of a covered “auto”...

1. Who Is An Insured

The following are “insureds”:

- a. You for any covered “auto”.
- b. Anyone else while using with your permission a covered “auto” you own, hire or borrow

...

- (5) A partner (if you are a partnership) or a member (if you are a limited liability company) for a covered “auto” owned by him or her or a member of his or her household.

4.14 The Auto Policy contains the following pertinent definitions:

- A. “Accident” includes continuous or repeated exposure to the same conditions or repeated exposure to the same conditions resulting in “bodily injury” or “property damage”.
- B. “Auto” means:
1. A land motor vehicle, “trailer” or semitrailer designed for travel on public roads; ...
- C. “Bodily injury” means bodily injury, sickness or disease sustained by a person, including death resulting from any of these.

* * *

- M. “Property damage” means damage to or loss of use of tangible property.

4.15. The Auto Policy contains the following pertinent Conditions:

SECTION IV – BUSINESS AUTO CONDITIONS

The following conditions apply in addition to the Common Policy Conditions:

A. Loss Conditions

* * *

2. Duties In The Event Of Accident, Claim, Suit Or Loss

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

- a. In the event of “accident”, claim, “suit” or “loss, you must give us or our authorized representative prompt notice of the “accident” or “loss”. Include:
- (1) How, when and where the “accident” or “loss” occurred;
 - (2) The “insured’s” name and address; and
 - (3) To the extent possible, the names and addresses of any injured persons and witnesses.
- b. Additionally, you and any other involved “insured” must:

- (1) Assume no obligation, make no payment or incur no expense without our consent, except at the “insured’s” own cost.

4.16. The Auto Policy contains the following endorsement:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

WASHINGTON CHANGES – DEFENSE COSTS

This endorsement modifies insurance provided under the following:

COMMERCIAL AUTOMOBILE COVERAGE PART

* * *

- A.** The provisions of Paragraph B. are added to all Insuring Agreements that set forth a duty to defend under:

- 1.** Section I of the Commercial General Liability, Commercial Liability Umbrella, Electronic Data Liability, Farm, Liquor Liability, Owners And Contractors Protective Liability, Pollution Liability, Products/Completed Operations Liability, Product Withdrawal, Medical Professional Liability, Railroad Protective Liability and Underground Storage Tank Coverage Parts, Auto Dealers Coverage Form and the Farm Umbrella Liability Policy;
- 2.** Section II under the Auto Dealers, Business Auto and Motor Carrier Coverage Forms;

* * *

- B.** If we initially defend an insured (“insured”) or pay for an insured’s (“insured’s”) defense but later determine that none of the claims (“claims”), for which we provided a defense or defense costs, are covered under this insurance, we have the right to reimbursement for the defense costs we have incurred.

The right to reimbursement under this provision will only apply to the costs we have incurred after we notify you in writing that there may not be coverage and that we are reserving our rights to terminate the defense or the payment of defense costs and to seek reimbursement for defense costs.

V. FIRST CAUSE OF ACTION – DECLARATORY RELIEF

1 5.1 Western National incorporates by reference the allegations of all paragraphs
2 above as if fully alleged herein.

3 5.2 In accordance with 28 U.S.C § 2201, Western National seeks a ruling from this
4 Court that the neither the Commercial Policy nor the Auto Policy provide coverage for the
5 allegations against Defendants Ross and Modular Organics in the Underlying Lawsuit.

6 5.3 An actual justiciable controversy exists between Western National and
7 Defendants concerning whether there is insurance coverage under either the Commercial Policy
8 or the Auto Policy for the allegations against Defendants Ross and Modular Organics in the
9 Underlying Lawsuit for one or more of the following reasons:

10 a. Because the allegations in the Underlying Lawsuit allege “bodily injury” and
11 “property damage” involving the use of an “auto” owned or operated by an Insured, there is no
12 coverage under the Commercial Policy;

13 b. The vehicle operated by Defendant Simon R. Ross at the time of the accident
14 giving rise to the Underlying Lawsuit was not a covered “auto” under the Auto Policy;

15 c. Defendants Ross and Modular Organics breached a material condition in the
16 Auto Policy that substantially prejudiced Western National when they failed to notify Western
17 National of the accident injuring the plaintiffs in the Underlying Lawsuit that occurred on April
18 17, 2023 and failed to tender the Underlying Lawsuit until March 1, 2024, eight months after
19 the Underlying Lawsuit was file and served.

20 d. Defendants Ross and Modular Organics breached a material condition in the
21 Auto Policy that substantially prejudiced Western National when they settled the Underlying
22 Lawsuit without the consent of Western National.
23

1 5.4 If this court determines that the claims alleged against Modular Organics and
2 Simon R. Ross and Jane Doe Ross in the Underlying Lawsuit are not covered under the Policy,
3 Western National is entitled to reimbursement of any and all costs it has incurred (after
4 notifying said defendant in writing of its reservation of rights in this regard) in defending each
5 party that the Court determines is not entitled to a defense.

6 5.5 Coverage is limited or precluded under such further policy language or other
7 grounds that may restrict or preclude coverage under the Commercial Policy or the Auto
8 Policy.

9 **VI. RESERVATION OF RIGHT TO AMEND**

10 6.1 Western National reserves the right to amend its complaint, in whole or in part,
11 as it obtains additional facts through investigation and discovery.

12 **VII. PRAYER FOR RELIEF**

13 WHEREFORE, Western National Mutual Insurance Company, having specifically
14 alleged the foregoing, requests the following relief:

15 1. For a determination of the rights and duties of the parties hereto under the
16 Commercial Policy and the Auto Policy;

17 2. For a declaration that Western National does not owe a duty to defend or
18 indemnify Defendants Ross and Modular Organics for all claims alleged against them in the
19 Underlying Lawsuit;

20 3. For a declaration that Western National is permitted to withdraw from the
21 defense of Defendants Ross and Modular Organics for all claims alleged against them in the
22 Underlying Lawsuit;
23

1 4. For a declaration that Western National is entitled to reimbursement of defense
2 costs incurred in defending Defendants Ross and Modular Organics from all claims alleged
3 against them in the Underlying lawsuit;

4 5. For entry of judgment in the amount of defense costs incurred in defending
5 Defendants Ross and Modular Organics from all claims alleged against them in the Underlying
6 lawsuit;

7 6. For all interest as allowed by applicable law;

8 7. For attorney's fees and costs incurred in this lawsuit as allowed by applicable
9 law.

10 8. For other and further relief as the Court deems just and equitable.

11
12 DATED this 27 day of June, 2024.

13 SOHA & LANG, P.S.

14 By: s/Paul Rosner
15 Paul Rosner, WSBA # 37146
16 Email address: rosner@sohalang.com

17 s/Rachel Rubin
18 Rachel A. Rubin, WSBA # 48971
19 Email address: rubin@sohalang.com
20 1325 Fourth Avenue, Suite 940
21 Seattle, WA 98101-2509
22 Telephone: 206-624-1800
23 Facsimile: 206-624-3585
 Attorneys for Plaintiff